FIRST DIVISION
September 30, 2013

No. 1-13-0450

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re BRITTANY S., a Minor (THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellee, v. BRITTANY S., Respondent-Appellant).	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 JD 3466 The Honorable Andrew Berman, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Respondent's delinquency adjudication for aggravated battery affirmed over challenge to the sufficiency of the evidence.

¶ 2 Following a November 2012 adjudicatory hearing in the circuit court of Cook County, 16-year-old respondent, Brittany S., was found delinquent of aggravated battery and battery and sentenced to one year of probation. Respondent now challenges the sufficiency of the evidence used to support the delinquency determination, and the propriety of the multiple adjudications under the one-act, one-crime rule.

¶ 3 The evidence adduced at the adjudicatory hearing showed that, on August 30, 2012, the 15-year-old victim, T.O., boarded a Chicago Transit Authority (CTA) bus to go home after school.

T.O. testified that she was alone, and that she sat in the back of the bus as she talked on her phone. About two or three minutes later, respondent, whom T.O. knew from school, boarded the bus with "[a]nother female and three boys." Respondent sat in the front of the bus, and those accompanying her sat in the back next to T.O. After the next bus stop, respondent walked to the back of the bus and started talking to her friends. Respondent then confronted T.O. and said "I heard you wanted to fight me." T.O., who was still on her phone, did not respond. T.O. testified that respondent then "put her hands on me[,] *** basically like hit me on the side—on the right side of my face *** [with] [h]er fist[,]" and they "started fighting[,] tussling, hitting each other back[,]" as the people with respondent "were trying to hold me down[.] *** Basically holding my hands so I couldn't hit her back." Respondent and her companions then got off the bus.

¶ 4 T.O. further testified that before the fight, she was holding the phone in her hand, but released it "[a]s soon as she hit me" and the phone "fell to the ground." On cross-examination, T.O. clarified that she was not talking about fighting respondent while she was on the phone, and that respondent "hit [her] first."

¶ 5 Albert Tompkins testified that he is a CTA bus operator. On the afternoon of August 30, 2012, he saw T.O. board the bus he was driving by herself, go to the back and sit down. He also saw respondent board the bus with "a couple young men[,] *** some other kids that got on there[,]" and she stopped "near the front of the bus or half way in between the driver's seat and the mid-door." After a few stops, Tompkins heard "someone saying there was a fight." Tompkins looked into his rearview mirror which allowed him to see "all the way to the back, *** the complete interior of the bus[,]" and saw respondent "fighting, swinging at another young lady[.]" He then stated "[t]he two young ladies and it was young men, they had their hands in, they were—it looked like they were swinging at one individual. I couldn't tell exactly who they were hitting but they were all swinging, fighting in the back of the bus." He told them to stop fighting and curbed the bus. He then saw a

young man holding T.O.'s hand "while [respondent] was swinging and hitting her and [T.O.] was fighting back with one hand trying to *** defend herself from [respondent.]" "[S]ome other kids" then pulled respondent off T.O., and the group ran off the bus, with one young man carrying a cell phone. On cross-examination, Tompkins acknowledged that he did not see who started the fight.

¶ 6 Respondent testified that she got on the bus by herself, and stood in the front at first, but then went to the back of the bus when she saw her "homeboy[.]" After sitting down next to him, respondent heard T.O., who was talking on the phone, say she wanted to fight her. Respondent approached T.O., asked if she wanted to fight, and T.O. "swung off on" respondent. According to respondent, a fight ensued between them with no one else involved. Respondent testified that she sustained injuries during the fight; her hair was pulled out and she "had a scar" under her eye.

¶ 7 During closing arguments, defense counsel contended that the "main issue in this case is who started the fight." Counsel maintained that Tompkins had not seen who started the fight, and "[t]here is no obvious outside reason why the [c]ourt should believe [T.O.] rather than [respondent]."

¶ 8 The court disagreed, finding that T.O.'s testimony was substantially corroborated by Tompkins, leading it to conclude that T.O.'s testimony was credible and respondent's was not. The court then adjudicated respondent delinquent of aggravated battery and battery.

¶ 9 On February 14, 2013, respondent filed a *pro se* notice of appeal from the judgment entered December 18, 2012, listing the offense as "aggravated battery." Because this notice was filed after the 30-day deadline, respondent's appellate counsel filed a motion for leave to file a late notice of appeal, alleging that the delay was due to an oversight on the part of trial counsel. This court granted that motion, and late notice of appeal was filed, listing the offense as "battery (finding of delinquency)."

¶ 10 Before addressing the merits, we must first review one procedural issue. The State, citing

Illinois Supreme Court Rule 303(b)(2) (eff. June 4, 2008), claims that this court is precluded from addressing either of respondent's claims regarding her battery adjudication, because she did not indicate that she was appealing that adjudication in her notice of appeal. Respondent replies that, in her late notice of appeal, she indicated that she was appealing the judgment entered on December 18, 2012, and listed her offense as "battery (finding of delinquency)[,]" which was sufficient under Illinois Supreme Court Rule 606 (Ill. S. Ct. R. 606 (effective March 20, 2009)), applicable to appeals from delinquency adjudication proceedings (Ill. S. Ct. R. 660(a) (eff. October 1, 2001)), to apprise the State that she intended to appeal both of her battery-related adjudications.

¶ 11 A notice of appeal serves to notify the party who prevailed in the trial court that the losing party seeks review of the trial court's judgment. *People v. Smith*, 228 Ill. 2d 95, 104 (2008). The notice of appeal is to be liberally construed, considered as a whole, and judged sufficient to establish jurisdiction in the appellate court if it adequately and fairly sets out the judgment complained of and the relief requested, thereby notifying the party who was successful in the trial court of the nature of the appeal. *Smith*, 228 Ill. 2d at 104-05. If a notice of appeal is merely deficient with regard to form rather than substance, and the appellee is not prejudiced, an appealing party's failure to strictly comply with the form of notice is not fatal to the appeal. *Smith*, 228 Ill. 2d at 105.

¶ 12 We find that, when viewed as a whole, respondent's notice of appeal was sufficient to notify the State that she was appealing the finding of delinquency entered by the circuit court on December 18, 2012, which contained adjudications for both battery and aggravated battery. The State does not specifically allege that it was prejudiced in any manner by respondent's failure to name each offense in the notice, and has fully briefed the issues with respect to both of them. Accordingly, we find that the notice was adequate to confer jurisdiction on this court to consider the appeal. *People v. Lewis*, 234 Ill. 2d 32, 38-39 (2009).

¶ 13 The State next alleges that respondent forfeited the issue regarding the court's finding of

bodily harm because she failed to file a post-adjudication motion and did not contest it at trial. The State also claims that during closing arguments, respondent conceded the injury element by arguing that the main issue was "who started the fight[,]" and she is now improperly "changing [her] theory of defense[.]" We note, however, that a challenge to the sufficiency of the evidence is not subject to waiver and may be raised for the first time on direct appeal (*People v. Woods*, 214 Ill. 2d 455, 470 (2005)), and that in the context of delinquency proceedings, a minor is not required to file a post-adjudication motion to preserve claims of error (*In re W.C.*, 167 Ill. 2d 307, 318-27 (1995)). Accordingly, the State's forfeiture argument fails.

¶ 14 Turning to the merits, respondent first claims that the State failed to prove her delinquent of battery or aggravated battery beyond a reasonable doubt. Respondent contends that we must review this claim *de novo*, because "the facts are not in dispute[.]" We disagree. Where, as here, respondent challenges the trial court's factual findings, *de novo* review is inappropriate. *In re Malcolm H.,* 373 Ill. App. 3d 891, 893-94 (2007). Thus, it is our responsibility to determine whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Malcolm H.*, 373 Ill. App. 3d at 893-94 (citing *W.C.,* 167 Ill. 2d at 336).

¶ 15 To prove respondent delinquent of battery in this case, the State was required to establish that she knowingly caused bodily harm to T.O. (720 ILCS 5/12-3 (West 2012)), and additionally, on the aggravated battery charge, that T.O. was a "transit passenger" (720 ILCS 5/12-3.05(d)(7) (West 2012)). In this court, respondent only challenges the sufficiency of the evidence to establish the element of "bodily harm[,]" claiming that there was no evidence that T.O. suffered pain or injuries from the encounter, and that "the prosecutor simply failed to elicit sufficient direct or circumstantial evidence to support the 'bodily harm' element of aggravated battery and battery beyond a reasonable doubt."

¶ 16 Our supreme court has held that, while it is difficult to pinpoint exactly what constitutes bodily harm under the statute, "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions" is required. *People v. Mays,* 91 Ill. 2d 251, 256 (1982). That said, proof of bodily harm does not require direct evidence of injury, and the trier of fact may infer injury based upon circumstantial evidence in light of common experience. *People v. Norfleet,* 259 Ill. App. 3d 381, 392 (1994). Thus, evidence of contact between the accused and the victim, combined with the common knowledge of the trier of fact, is sufficient to establish that the accused's conduct caused bodily harm. *People v. Gaither*, 221 Ill. App. 3d 629, 634 (1991).

¶ 17 Applying these principles to the case at bar, we find sufficient circumstantial evidence to establish the bodily harm element of the charged offenses. The evidence showed that respondent hit the right side of T.O.'s face with her fist, causing T.O. to drop her phone. Respondent was then seen "hitting[,]" "fighting, [and] swinging at" T.O., while one of her associates held back T.O.'s hand to prevent her from defending herself. The evidence further showed that respondent was "pulled *** off" of T.O. before she fled the bus, and respondent testified that during the encounter, her hair was "pulled out" and she "had a scar" under her eye. The testimony of respondent's repeated strikes to T.O., combined with the common knowledge of their effect, was sufficient to establish that she inflicted bodily harm by her conduct.

¶ 18 In this respect, we find this case analogous to *People v. Rotuno*, 156 Ill. App. 3d 989 (1987), where the reviewing court found sufficient evidence of bodily harm from evidence showing that defendant kicked police officers repeatedly in the legs and chest as they were attempting to get her into the squad car, and defendant's struggles were so forceful that the officers required assistance from a bystander to complete the arrest. Here, after viewing the evidence of the altercation in the light most favorable to the State, we likewise find that a rational trier of fact could conclude that the State proved beyond a reasonable doubt that respondent inflicted "bodily harm" on T.O. to establish

the charged battery offenses. *Rotuno*, 156 Ill. App. 3d at 993; see also *Norfleet,* 259 Ill. App. 3d at 393.

¶ 19 Respondent next contends that her adjudications for battery and aggravated battery are based on the same physical act, and therefore violate the one-act, one-crime rule. In so arguing, respondent concedes that she did not preserve the issue by raising it below, but contends that we should review it for plain error because it affected the fairness of her trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 20 In reviewing an issue for plain error, we must first determine whether an error occurred. *In re M.W.*, 232 Ill. 2d 408, 431 (2009). The one-act, one-crime rule prohibits multiple convictions when they are carved from the same physical act or where one of the offenses is a lesser included offense of the other (*People v. Quinones*, 362 Ill. App. 3d 385, 397 (2005)). The supreme court has determined that the one-act, one-crime rule is applicable to juvenile proceedings, and thus, reviewing courts must determine whether it applies under the facts of a particular case. *In re Samantha V.*, 234 Ill. 2d 359, 377-78 (2009).

¶ 21 Respondent contends that a violation of this rule is evident in the petition for adjudication of wardship, where the descriptions of her conduct providing the basis for both battery offenses were identical. The State responds that the evidence showed that respondent repeatedly struck the victim, and that each strike may constitute a separate act, and thus, no error occurred in finding her delinquent of both charges.

¶ 22 The supreme court has held that, where the accused is alleged to have repeatedly struck a victim, each strike "could support a separate finding of guilt for aggravated battery *** if the charging document reflects the State's intent to apportion the accused's conduct." *Samantha V.*, 234 Ill. 2d at 378 (citing *People v. Crespo*, 203 Ill. 2d 335, 345 (2001)). In the present case, respondent struck T.O. multiple times, but the State did not apportion her conduct separately. In the petition

for adjudication of wardship, the State alleged that respondent committed aggravated battery on T.O., a transit passenger, by "punch[ing] [T.O.] in the head, causing bruising and pain." In alleging respondent's commission of battery, the State likewise defined respondent's actions as "punch[ing] [T.O.] in the head, causing bruising and pain." The record also shows that the State made no attempt to apportion her conduct at the adjudicatory hearing, or otherwise differentiate the blows.

¶ 23 Under these circumstances, we find that the battery and aggravated battery charges were based on the same physical conduct, and as a result, the trial court violated the one-act, one-crime rule when it found respondent delinquent of both offenses. *Samantha V.*, 234 Ill. 2d at 377-78 (holding that multiple convictions violated the one-act, one-crime rule where the State did not differentiate between the multiple strikes to the victim's head when it charged the accused with the same conduct under two different theories of criminal culpability); *Crespo*, 203 Ill. 2d at 342-45 (finding that convictions for both aggravated battery and armed violence violated the one-act, one-crime rule where the same physical act of stabbing formed the basis for both crimes, and the State did not differentiate between the separate stabs).

¶ 24 Accordingly, we conclude that respondent satisfied her burden to show plain error in this case. *Samantha V.*, 234 Ill. 2d at 378-79 ("it is well established that a one-act, one-crime violation affects the integrity of the judicial process, thus satisfying the second prong of the plain-error test."). We therefore vacate respondent's battery adjudication because it is the less serious offense (*People v. Artis*, 232 Ill. 2d 156, 170 (2009)), affirm the judgment of the circuit court of Cook County in all other respects, and direct the circuit court clerk to correct the mittimus accordingly (Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999); *People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008) (this court has the authority to order the clerk of the circuit court to correct the mittimus)).

¶ 25 Affirmed in part, vacated in part, mittimus corrected.